SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1805

AMERICAN DAIRY OF EVANSVILLE, INC.,
Petitioner,

against

KRAFTCO CORPORATION,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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Respondent has made deliberately erroneous and misleading statements in its brief in opposition to the granting of Petitioner's Petition For A Writ of Certiorari. Such erroneous and misleading statements run throughout Respondent's brief in that Respondent represents to the Court that there was no evidence of concurrent use of the two marks in the same marketplace; and that there was no evidence of no actual confusion. As an example of such erroneous statements, at page 10 the Respondent states: "First, there is no evidence concurrent use in the same marketplace." At page 13 Respondent states: "First, petitioner wrongly asserts that there was 'substantial evidence of no actual confusion.'" The Respondent further compounds the effect of such misleading statements by stating at page 7 of its

brief: "Since the reality of the situation is that respondent has the right to expand its use of its registered mark to the petitioner's marketing area, . . ." Thus, Respondent has deliberately attempted to mislead the Court into believing that the two marks in question have not been in concurrent use.

With respect to concurrent use, Mr. Hottenstein, the President of the Petitioner, testified as follows:

R. 27

Q.12. And what is the geographic area within which you operate? A. The geographic area would be approximately a hundred-mile radius of Evansville. . . .

Q.13. What states are encompassed within that hundred-mile radius? A. Indiana, Kentucky and Illinois.

R. 44

Q.134. And in what area was the product being sold between March '68 and February '69? A. It was sold in the three-state area where we operate.

Q.135. And is that true from the very beginning? A. Yes.

R. 52

Q.178. Have you seen any ice milk cartons for the "Light N' Lively" product? A. Yes, I have.

Q.181. Where is that located? A. Here in Evansville.

R. 121

Q.72. In what states do you market your product? A. Kentucky, Illinois and Indiana.

Mr. Paschkes, the Marketing Manager for Respondent, testified with respect to its marketing area as follows:

R. 63

Q.23. By what time had you covered those 29 states with the Light N' Lively low fat milk? A. . . . To the best of my recollection, we were selling the product in all other 28 states by end of 1968. . . .

R. 64

Q.27. Do you have any recollection of the extent of the states covered by the end of 1967 with the Light N' Lively low fat milk? A. I would say all but the seven that I mentioned before. And to the best of my recollection, the seven included Massachussetts, Connecticut, New Jersey, Virginia, Georgia, Alabama, Mississippi. I could be wrong.

Q.28. Were you in those states by the end of '68? A. To the best of my recollection, all but Mississippi.

R. 67

Q.50. What states are covered by the central division? A. Northern Tennessee, up to Wisconsin and including Illinios, Indiana, Missouri, Kansas, Kentucky. . . .

R. 70

Q.67. In what area have Exhibits 44 through 56 been used? A. . . . In all markets in which we have used television, with the exception of the markets in the State of Louisiana.

Q.70. Does your television spot commercial advertising the Light N' Lively product go into areas where the product is actually not being sold? A. Yes.

R. 90

XQ.197. Does Sealtest market in Evansville, Indiana? A. Yes, we do.

XQ.198. Do you market the Light N' Lively trademark product in Evansville? A. A Light N' Lively trademark product, we do. It is most likely the ice milk. I don't know if Light N' Lively low fat milk is sold there or the other two dairy products.

XQ.199. Is the Light N' Lively low fat milk sold in Indiana? A. I would have to review the list of markets in Indiana. I believe it is sold in Indiana, but I couldn't say for sure.

XQ.200. How about Kentucky? A. Yes, it is sold in Kentucky.

XQ.201. Illinios? A. Yes.

R. 94

XQ.235. Do you market your trademark products Light N' Lively in Louisville, Kentucky? A. Yes, we do.

The Respondent, in its brief to the United States Court of Customs and Patent Appeals, represented at page 5 "Appellant's television advertising featuring its mark Light N' Lively has been broadcast in all States east of the Mississippi." Judicial notice can be taken that Indiana, Illinois and Kentucky are east of the Mississippi.

Mr. Hottenstein testified with respect to no actual confusion as follows:

R. 46

Q.151. Do you know whether there's been any reports received at American Dairy of Evansville, Inc. as to any members of the public having inquired as to a connection between your "Lite N' Tasty" and the "Light N' Lively" product? A. No questions have ever been brought to my attention and I've checked with other people since your record here and to my knowledge, nothing has ever been asked about the difference in the quality of the product. . . . And no connection . . .

R. 121

Q.71. Since you have been marketing the product "Lite N' Tasty", have you had any actual confusion in the trade with your product? A. There has at no time ever to anyone in the management of the company, and we have not had any concern whether there was any confusion of the product.

Mr. Paschkes testified with respect to no actual confusion as follows:

R. 91

XQ.209. You have not heard of any likelihood of confusion between the trademarks "Lite N' Tasty" and "Light N' Lively", is that correct? A. I personally have not.

In *Glenwood Laboratories v. American Home Products Corp.* 455 F.2d 1384, Judge Giles Rich stated:

"The record fails to show any instance of actual confusion, and I think it is reasonable to infer that there

has been none, else Appellee would have made much of it."

Thus, in the case at bar, if there had been any actual confusion, the Respondent certainly would have introduced it as evidence.

The Respondent further attempts to mislead the Court by stating at page 10 of its brief: "Secondly, the testimony as to the use of the two marks during the same time period is March 14, 1968 to December 8, 1970." The Petitioner's testimony in chief was taken on February 5, 1971. (R.107)

At page 5 Respondent states that: . . ."The only protection to which respondent is entitled with respect to that prefix is when it is joined with the word 'LIVELY' or some other term which is confusingly similar to 'LIVELY' as applied to lowfat milk and related products." As to date, the Respondent has equated "some other term" as being modern, happy, trim, slim, and tasty. (R.147-149) The Respondent has sought protection of its Federal Registered trademarks with respect to such third party marks as "LIGHT 'N MODERN", "LIGHT 'N HAPPY", "LITE N' TRIM" and "LITE N' SLIM". (R.147-149) Thus, the Respondent will continue to use its Federal Trademark Registrations as a sword to create an illegal monopoly with any other term used with the common prefix, which is contrary to the intent of Congress.

The Petition For Writ Of Certiorari should be granted for the reasons set forth in the Petition.

Respectfully submitted,

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Attorney for Petitioner.